



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI- 83-37

FACTS:

On (date omitted), you became an employee of a state agency (XYZ) and as such, you also became a Board Member of another state agency (ABC). (citation omitted). Prior to this employment, you were one of two general partners of the DEF Partnership. You were also a general and limited partner of the RST Limited Partnership. The business of these partnerships is (description omitted). Pursuant to this end, on (date omitted) both partnerships entered into a contract with ABC, a state agency, for long-term financing of the business. The availability of ABC funding for businesses involving (description omitted) was publicized through newspapers and state pamphlets. A public hearing was also held to inform the public of your business. The contract represents an Agreement between ABC, another entity, DEF and RST. Under the terms of the contract, (description of Agreement omitted). Over the next few months additional funding for the business will be solicited from the public.

After learning of your state employment, you took steps to divest yourself of any interest you had in DEF and RST. On (date omitted), you assigned your rights, title and interests in the two partnerships to your wife and gave her an irrevocable power of attorney. Your wife is a part-time state employee. She gave no consideration for the assignment and, prior to receiving it, was not involved in the business. Your wife became a limited partner in DEF and a general and limited partner in RST. You indicate that your wife received the assignment as a gift because a dollar value of your interest in the business was impossible to ascertain at this time, and further, because she is someone whom you can trust to operate the business. Due to the speculative financial value of the business, you also indicate that you were unable to sell your interests to your partner or to any other individual.[1]

QUESTION:

1. Does the assignment of your interest in the business to your wife represent complete divestiture of your financial interest in a contract made by a state agency for the purposes of complying with G.L. c. 268A, s.7 of the conflict of interest law? 2. Are you eligible for an exemption under s.7 as amended by St. 1982, c. 612, s.5?

ANSWER:

1. No.

2. Yes, subject to certain conditions.

DISCUSSION:[2]

I. Imputation of Spouse's Financial Interest In a Contract Made by a State Agency

As an employee of XYZ, you are a state employee as that term is defined in s.1(q). As such, you are prohibited from having a direct or indirect financial interest in a contract made by a state agency. G.L. c. 268A, s.7. The contract between ABC and DEF and RST is a contract made by a state agency. Notwithstanding the assignment transaction that took place between you and your wife, thereby giving her a direct financial interest in the ABC contract, the Commission concludes that you retain an indirect financial interest in the contract in violation of s.7. As a general rule, s.7 does not automatically attribute a spouse's financial interest in a state contract to the state employee. See EC-COI-80-105, 80-60, 80-39, 80-25. However, the Commission does recognize that there may be instances as in this case, where such attribution is warranted (see EC-COI-82-128) and the Commission will not allow an individual to circumvent the conflict of interest law by transferring assets to members of his immediate family.[3] In the Matter of John Buckley, Commission Adjudicatory Docket No. 108, Decision and Order, pg. 19 (May 7, 1980).

In prior Attorney General Conflict Opinions and Commission Advisory Opinions, dealing with spouses' contracts, it was not the assignment of an interest in the contract by a state employee that gave rise to the spouse's financial interests. In those opinions, the spouse was either engaged in his own business or shared an interest in the business with the state employee. Therefore, this case is distinguishable from previous rulings in this area, since your wife was not involved in the business prior to the assignment. Further, there is no indication that she has any background, expertise, or interest in this field of business.

Notwithstanding the speculative financial value of the business, the public will be solicited for funding but your wife was not requested to contribute even a nominal sum as consideration for the assignment. Under these facts, it is clear that the assignment to your wife was made, in part, on the basis that she is someone on whom you can rely to handle the business in the same manner as yourself. Moreover, by having day-to-day contact with your wife, there is no evidence to support the assignment as an "arm's length" transaction. In view of the circumstances surrounding the assignment, the Commission concludes that you can "fairly" be said to still have a financial interest in the business. See Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 *Boston University Law Review* 299, 375 (1965). Cf. *Starr v. Board of Health of Clinton*, 356 Mass. 426(1969).

II. Eligibility For An Exemption Under s.7 As Amended by St. 1982, c. 612, s.5

As of March 29, 1983 an amendment to s.7 will take affect. This new section permits a state employee, other than a member of the general court, to maintain a financial

interest in a contract made by a state agency where the following requirements are fulfilled.

- a) The employee is not employed by the contracting agency or an agency which regulates the activities of the contracting agency;
- b) he does not participate^[4] in or have official responsibility^[5] for any of the activities of the contracting agency;
- c) the contract is made after public notice; and d) the employee files with the Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract. In applying the provisions of this amendment to your situation, the Commission concludes that as of March 29, 1983, you will be in compliance with s.7 if you file the appropriate disclosure and follow the guidelines set out below.^[6]

As a state employee, you or your designee are statutorily required to serve as a Board Member of ABC. (citation omitted). However, your service to ABC under these circumstances does not make you an employee of that agency. Pursuant to its own enabling legislation, ABC is not under the supervision or control of XYZ, Id. Therefore you also are not employed by an agency which regulates the activities of ABC.

A broader discussion is necessary regarding your participation in and your official responsibility for the activities of ABC. In your position on ABC, you can abstain from participating in matters in which you, or an immediate family member, have a financial interest. Notwithstanding this abstention, as a Board Member, you would still have official responsibility for such matters since this term addresses your authority in connection with a matter and not whether that authority is exercised. EC-COI-83-29; 83-9; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, supra, at 321. However, the Commission concludes that in the circumstances of this case, you can absolve yourself of official responsibility over any ABC activity since the enabling legislation of ABC allows you to designate an individual to serve in your place and since service on the Board is independent of your day-to-day duties as an employee of XYZ. To do so, you must designate an individual to serve in your place and adhere to the following guidelines (such action on your part will be tantamount to resigning from the position):

1. Your designee on ABC should be chosen by your appointing official.
2. The designation should be irrevocable for as long as you remain a state employee.
3. The designee should abstain from participating in matters in which you or the partnerships have a financial interest.

In addition to complying with the s.7(b) exemption, these guidelines will ensure that the designation is free from the appearance of an impropriety in violation of s.23, as amended by St. 1982, c. 612, s.14. This section prohibits a state employee from giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. In order to avoid the appearance that your designee will unduly favor your business before ABC, he should be an

individual who has no relationship to you and, therefore, is not accountable to you for his actions.

The final requirement of the s.7(b) exemption is the public notice provision. For the purposes of s.7, the public notice requirement was established to assure that the general public has equal access to state contracts. With respect to this provision, the Commission concludes that the ABC application process and public education efforts offer the vestiges of openness that are contemplated by the amendment. Cf. EC-COI-81-97. When ABC acquired the authority to fund businesses such as yours, it made a conscientious effort to inform the public of the availability of funds. Information was published in state pamphlets and newspapers of general circulation. ABC participated in educational seminars held by other state agencies, and sent representatives to inform officials of cities and towns of this program. Moreover, before final approval is rendered by ABC, the applicant must comply with a process that is geared toward public awareness. In addition to notifying the city or town in which the business is located, the applicant must participate in a public hearing held by ABC for the purpose of gathering public comment regarding the business. In view of these facts, if you file the appropriate disclosure with the Commission and follow the guidelines above, you will be in compliance with s.7 as amended by St. 1982, c. 612, s.5.

DATE AUTHORIZED: March 22, 1983

[1] From the information provided, it is unclear whether anyone other than your partner and your wife was approached regarding the purchase of your interest in this business.

[2] Since the Commission concludes that the assignment of your interests to your wife does not comply with G.L. c. 268A, but that you may comply with s.7 as amended by St. 1982, c. 612, s.3, this opinion will not discuss the applicability of the law to your wife.

[3] For the purposes of G.L. c. 268A, "immediate family" is defined as the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, s.1(e).

[4] For the purposes of G.L. c. 268A, "participate" is defined as participate in agency, action or in a particular matter personally and substantially as a state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(k).

[5] For the purposes of G.L. c. 268A, "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, s.1(i). [6] This conclusion remains the same whether you keep your interest in the partnerships or continue the assignment transaction with your wife.